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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 1948 74

ANTHONY VESPOLE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

A

Summary Statement of the Matter Involved

1. Proceedings

Petitioner was convicted after trial by jury in the United States District Court for the Southern District of New York on two indictments, one charging him and others with causing the transportation in interstate commerce of stolen

goods in violation of Title 18, U. S. C. (1940 ed.), Section 415 (National Stolen Property Act), and the other charging conspiracy to commit that offense. A motion for a new trial on the ground of newly discovered evidence was denied.

Petitioner appealed to the Court of Appeals for the Second Circuit. On April 11, 1949, the Court of Appeals filed its opinion and judgment by which it reversed petitioner's conviction on the conspiracy indictment, on the ground that there was "no evidence" that petitioner knew of the plan to transport the goods in interstate commerce (R. 1044). However, it affirmed petitioner's conviction on the indictment of the substantive offense, holding that under that statute there was no requirement for proof of knowledge on his part that the goods were to be transported in interstate commerce, or of participation by him in the transportation.

Petitioner filed a petition in the Court of Appeals in due course on April 26, 1949, praying for a rehearing insofar as the judgment of the District Court had been affirmed. This petition was denied on April 29, 1949.

2. Evidence Against Petitioner

The pertinent facts may be summarized as follows: DeSatnick, a truck driver for Revillon Freres, discussed with Schneiderman, another employee of Revillon, stealing from Revillon a truckload of furs. Unable to arrange for both to be assigned to the one truck, they determined to bring in outsiders who would stage a holdup of the truck driven by DeSatnick (R. 53).

On the evening of November 18, 1946, DeSatnick and Schneiderman met with Tannuzzo, Dellaratta, Aurecchione and petitioner Vespole and agreed that on the following day, at a given signal by DeSatnick, Vespole would carry out the simulated holdup of the truck (R. 57-59). DeSatnick had met Vespole for the first time a week before when the project was first discussed among them, but had known the others for several years (R. 92).

On November 19th the "holdup" was carried out as planned at 31st Street and Eighth Avenue, Manhattan; DeSatnick accompanied by Vespole, drove the truck to Brooklyn, where it was turned over to Tannuzzo and Dellaratta, who removed it to some undisclosed place (R. 62-65).

Early in December, DeSatnick sought out Aurecchione, who, when he found him, was in the company of Vespole on the street. Aurecchione's response to DeSatnick's inquiry concerning the furs was "that the stuff is hot" and was occasionally being moved from place to place. Vespole said nothing (R. 71). There was no suggestion of any interstate transportation up to and past that point.

The foregoing constitutes all of the testimony concerning petitioner Vespole's participation in the matter.

The Court of Appeals' conclusion was that this evidence indicated that Vespole "stole the furs and turned them over to Tannuzzo and Dellaratta to sell for joint account without limitation as to where the sale was to be made", and that he might therefore properly be found guilty of causing their transportation in interstate commerce, if Tannuzzo and Dellaratta at a subsequent date, without his knowledge, arranged for a sale pursuant to which they were taken across the state line ~~(R. 1045)~~. (R.1043)

There is, however, no scintilla of evidence that Tannuzzo and Dellaratta were to sell the furs "for joint account", or that petitioner had the slightest interest in what disposition Tannuzzo and Dellaratta made of them. There is nothing whatsoever in the evidence to imply that petitioner's services and interest in the matter did not terminate with the holdup of the truck on November 19th.

3. Evidence of Interstate Transportation

The testimony concerning the interstate transportation of the goods was as follows: On December 9, 1946 (some three weeks after the robbery), Aurecchione and one Maislich approached Felstein and Grossman in Newark, New Jersey, and offered them the furs (R. 166, 167). On December 10th Grossman examined the furs in Brooklyn

where they were shown to him by Tannuzzo and Dellaratta (R. 167, 170, 171). Felstein agreed to purchase the furs, and on December 11th Aurecchione, Tannuzzo and Dellaratta loaded the furs into Grossman's truck in Brooklyn, New York, and Grossman drove the furs to New Jersey (R. 172, 176-178). The truck broke down, was abandoned and fell into the hands of the New Jersey police. The following day Aurecchione, Tannuzzo and Dellaratta conferred with Felstein and Grossman in New Jersey in an unsuccessful effort to secure payment for the furs (R. 183).

All of the testimony concerning the interstate transportation of the goods was given by Grossman. Petitioner Vespole was not named as having participated in any way in that transaction. Vespole was not even mentioned in that testimony.

4. Restrictive Ruling on Cross-Examination

The Government's material witness Grossman had been four times previously convicted of crime, once in 1929 for possession of narcotics (R. 158). He had been addicted to the use of narcotics for eighteen years (R. 189) but maintained that he had been cured of his addiction in May, 1947, five months before the trial of this case (R. 161, 190, 191). At the beginning of his testimony, the defendants requested a physical examination because he appeared to be under the influence of narcotics (R. 160, fol. 480). This application was denied, but the Court permitted a brief interrogation of the witness, out of the hearing of the jury, to determine whether the witness was competent to testify. Since the witness maintained that his previous use of narcotics had been by hypodermic injection, he was requested to exhibit his arm to the Judge, for the purpose of exposing recent needle punctures (R. 162). However, the Court sustained the prosecutor's objection to this exhibition, accepted the witness' statement that he was not presently using narcotics, and ruled him competent to testify.

Upon cross-examination in the presence of the jury, the same subject was attempted to be explored for the pur-

pose of impeaching credibility. The witness repeated his contention that he had used no drugs for the previous five months. The prosecutor's objection to a question as to the manner in which the witness took drugs was sustained (R. 189, 190), although counsel explained that the question was preliminary in character, and was intended to lay the foundation for calling a physician to testify as to the witness' condition (R. 190, fol. 568). The Court made the observation, in the hearing of the jury, that he had already ruled the witness to be competent, that credibility could be impeached by interrogation concerning prior convictions, but that "we" are not concerned with how he took dope (R. 190, fols. 568, 569).

The Court of Appeals justified this ruling with the statement that counsel's "purpose was not made clear to the Judge", that the Judge did not know that credibility was being attacked, and that the excluded answer would have been immaterial ~~(R. 1048)~~ (R 1046)

The same witness upon cross-examination denied that he had been "holding out for a deal" before he determined to plead guilty and to testify for the Government, and also maintained that "no deal was made" in connection with his plea (R. 210-211).

5. Motion for a New Trial

On October 16, 1947, petitioner was convicted and sentenced to eight years on each of the indictments, to run concurrently.

On March 8, 1948 the case having been remanded by the Court of Appeals for that purpose, a motion was made for a new trial on the ground of newly discovered evidence viz., that Grossman had testified falsely (1) when he said he had not been "holding out for a deal", and that "no deal was made with him", and (2) when he said he was not using and under the influence of narcotics during the trial, and that he had been cured of his addiction some months before.

A hearing was had at which the prosecutor himself (an Assistant United States Attorney) testified that Grossman had indeed been holding out for a "deal", to an extent where the prosecutor had been obliged to secure the adjournment of the trial from July to October 1947 (R. 972, fol. 2914; R. 994, fol. 2980) because of Grossman's refusal to plead guilty until he could learn "what was in store for him" (R. 965, fol. 2894). The prosecutor testified that Grossman expected a sentence of ten years if he persisted in pleading not guilty (R. 965, fol. 2895), and that on October 6, 1948 he (the prosecutor) had told Grossman's lawyer that in the event of a guilty plea he did not believe Grossman would receive more than two or three years "unless a judge should see something more than I see" (R. 970, fol. 2908).

Grossman's lawyer testified to Grossman's anxiety to make a "deal" in connection with his plea of guilty, and that no plea of guilty was entered until the Assistant United States Attorney informed the lawyer that his personal recommendation to his superiors as to Grossman's sentence would not exceed two years (R. 622, fols. 1865, 1866).

An affidavit was submitted upon the hearing by petitioner Vespole's lawyer to the effect that he had interviewed Grossman in jail (after the trial) on December 11, 1947 at which time Grossman had stated that his (Grossman's) lawyer had been told by the Assistant United States Attorney before the trial that the Assistant's recommendation in the event of a plea of guilty would be not more than two years (R. 605, fols. 1813, 1814).

Grossman was sentenced on December 1, 1947, by a judge other than the Trial Judge, to eighteen months, upon the recommendation of the Assistant United States Attorney (R. 794-795, fols. 2382-2385), who himself testified that he secured approval for this recommendation from his superiors by "grossly exaggerating" (R. 987, 989, fol. 2966; R. 990, fol. 2969) the extent of Grossman's assistance, and that he repeated this exaggeration to the sentencing Judge (R. 992, fols. 2974, 2975).

The Court of Appeals held that the Trial Judge "upon conflicting evidence" made findings justifying his denial of the motion for a new trial (~~R. 1050~~ (R. 1047)). The District Judge's findings were that Grossman's trial testimony on the subject was "truthful and accurate" (R. 1020, fol. 3060), that the Assistant United States Attorney was indifferent as to whether Grossman pleaded guilty, offered no inducement, even "implied", to encourage it, and gave no "indication" as to what his sentence recommendation would be (R. 1021, fol. 3062). There was no evidence to support these findings, and all the evidence established the contrary and was conflicting only as to wholly immaterial details. The District Judge also found that even if Grossman had perjured himself on this subject, and the jury had known of such perjury, that would not have affected his credibility (R. 1023, 1024, fols. 3068-3070).

Only with respect to the second ground for the motion, concerning Grossman's addiction to narcotics, can it be said that the evidence was conflicting, and then only to the extent that Grossman himself upon the hearing of the motion reiterated his trial testimony that he had been cured five months before the trial. As opposed to this, there was proof that when Grossman was committed to jail six weeks after the trial, the prosecutor recommended that he be sent to a narcotic hospital to be cured of his addiction (R. 795, fols. 2384, 2385), and Grossman was found by the prison medical authorities to be still actively addicted to the use of narcotics at that time (R. 767, 768). Petitioner's attorney testified that Grossman admitted to him on December 11, 1947, that he had been using narcotics throughout the trial and that his trial testimony on that subject had been false (R. 604, fols. 1810, 1811). Another attorney testified that one week before the trial Grossman had claimed that he needed what money he had to buy narcotics (R. 770, 771, fols. 2310, 2311).

B

Jurisdictional Statement

The jurisdiction of this Court is invoked under Section 1254, Title 28, United States Code, and Rule 37(b) of the Rules of Criminal Procedure.

C

The Questions Presented

The principal questions presented are:

1. Whether one may be convicted of causing stolen goods to be transported in interstate commerce merely upon evidence, without more, that he stole the goods locally where he turned them over to other persons, who three weeks thereafter, entirely without his knowledge or participation, first determined to, and did, transport them in interstate commerce.

2. Whether conviction for the substantive crime of causing the interstate transportation of stolen goods should be affirmed, when the Court of Appeals reverses a conviction for conspiracy to commit that offense, stating that there was no evidence the defendant knew of the plan to transport the goods in interstate commerce.

Other less important questions presented are:

3. Whether the Trial Court may exclude cross-examination of the principal prosecution witness, the stated purpose of which is to lay a foundation for medical testimony that the witness is under the influence of narcotic drugs, where the witness denies his use of drugs.

4. Whether a denial of a motion for a new trial on the ground of newly discovered evidence must be affirmed without appraisement when the Judge's material findings of fact as to one of the two grounds of the motion are without any support in the evidence, and are contradicted by all the evidence taken.

5. Whether a denial of a motion for a new trial on the ground of newly discovered evidence must be affirmed when it is based upon the Judge's "finding" that the perjury of the principal prosecution witness as to having made a "deal" with the prosecution concerning his sentence, and as to being under the influence of drugs while testifying, would not have affected his credibility if the jury had known of such perjury.

D

Reasons Relied Upon for the Allowance of the Writ

1

The evidence showed only that the petitioner committed a robbery punishable under applicable State criminal statutes. But because he turned over the stolen goods to others, who three weeks later, without his knowledge or participation, first determined to, and did, transport them in interstate commerce, the Court below has held petitioner amenable to Federal prosecution for having "caused" the interstate transportation of the goods.

The doctrine is thus enunciated that every thief violates the Federal statute if the goods he steals are at some later date, without his knowledge and participation, placed by others in the stream of interstate commerce. This great extension of the field of Federal criminal jurisdiction was sought to be palliated by the Court's gratuitous statement that the sale by the actual transporters of the goods was

to be "for joint account," but there was no evidence whatsoever of that.*

There is here no dispute about "facts". The question is the extent of conjecture permissible in the absence of proof in a criminal prosecution.

The holding that merely by the act of stealing property and turning it over to others, one "causes", willy nilly, any interstate transportation effected by those others at a substantially later time, extends criminal responsibility for substantive offenses in a manner heretofore unknown to the criminal law. As was said in *Krulewitch* v. *United States*, 93 L. ed. (Adv. Op.) 623, 633 (concurring opinion of Mr. Justice Jackson): "Few instruments of injustice

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* The Court of Appeals in its recital of the facts bolsters its conclusion by quoting certain testimony taken under the conspiracy indictment which it construes to signify that petitioner was to "take care of the money deal" (R. ~~1042, 1044~~ (R. 1041, 1043)). The testimony referred to was given by DeSatnick (R. 129), who related a conversation he had with Schneiderman prior to the theft, the meaning of which the Court of Appeals has completely and demonstrably misconstrued. The testimony when considered in context plainly means that as between DeSatnick and Schneiderman, DeSatnick was to co-operate with Vespole in the holdup, and Schneiderman was subsequently to "take care of the money deal", i.e., to collect his and DeSatnick's share of the proceeds. An ambiguous sentence has been erroneously construed out of context by the Court below so as to appear to implicate petitioner in the later disposition of the goods. The Court is respectfully referred to petitioner's petition for rehearing below (R. 1038) ~~(R. 1062)~~ where quotations of the context of DeSatnick's testimony on the subject are compiled, which disclose beyond peradventure that the bit of testimony quoted by the Court of Appeals cannot possibly have the meaning that Court has put upon it.

In any event, that testimony was admitted under the conspiracy indictment, over petitioner's objection and subject to his motion to strike (R. 131, fol. 393; R. 306, fol. 918; R. 52, fol. 155) for failure to prove his participation in a conspiracy, which motion was erroneously denied (R. 322-323, fols. 966-967). The conspiracy conviction having been reversed for lack of proof, this ambiguous bit of testimony which is the plainest sort of hearsay against petitioner as proof of the substantive charge is now relied upon to piece out a case against him.

can equal that of implied or presumed or constructive crimes". Since interstate transportation of stolen property can hardly be said to be the natural and probable result of every theft, there is no room here for the argument that every thief may be said in legal logic to intend it, absent proof by him to the contrary.

If goods are stolen by one and turned over to others within the single State, and come to rest, and long after, by action initiated by those others, are transported in interstate commerce, does the Federal statute prohibiting such transportation mean to penalize also the original thief without knowledge thereof? If so, there must be the gravest doubt of the constitutional power of Congress thus to legislate against local crimes under the guise of regulating interstate commerce.

The District Judge dismissed the case (R. 549) against a defendant, Schneiderman (indicted for the substantive offense, but not for conspiracy) whose participation was considered by the prosecutor to be similar in scope to your petitioner's (R. 314, fol. 942; R. 536, fol. 1606). The Judge felt that Schneiderman's lack of knowledge of the interstate transportation militated against his conviction for the substantive offense, though he thought such lack of knowledge would not have been fatal to a conspiracy conviction (R. 548, 549, fols. 1644-1645). Contrariwise, the Court of Appeals reversed petitioner's conviction of conspiracy because of his lack of knowledge of the interstate transportation, but affirmed his conviction for the substantive offense. (R. 1044)

That Court states that conviction for the substantive offense does not require proof of knowledge by the defendant that the stolen goods were to be transported in interstate commerce (~~R. 1045~~). But this Court in *United States* v. *Sheridan*, 329 U. S. 379, 391, in discussing the same statute was at pains to show that the defendant there must have known that interstate transportation would necessarily result from his conduct, by no means suggesting that such foreknowledge was in any event unnecessary.

2

Although the District Court knew (from a *voir dire* examination) that the principal prosecution witness would reply, if permitted, that in the past he had taken narcotics by hypodermic injection, it sustained the prosecutor's objection to the question put on cross-examination as to how he took narcotics. Although counsel had explictly stated to the Court that they sought thus to prepare the basis for a physician's testimony to show that the witness was under the influence of narcotics, and had earlier requested an exposure of the witness' arm for that purpose, the Court of Appeals says counsel's "purpose was not made clear to the Judge."

The Court below says counsel offered no expert testimony to show how the subject was material, although plainly an expert witness could not testify, lacking any foundation in the evidence for his testimony because of the judge's restrictive ruling. That the subject was material was held in *Wilson* v. *United States,* 232 U. S. 563. That the witness's claim of non-addiction should be permitted to be rebutted by other testimony was held in *People* v. *Webster,* 139 N. Y. 73, 87. See also III *Wigmore on Evidence* (3rd Ed.) Sec. 1005 (e) p. 655, and *Chicago & N. W. Ry. Co.* v. *McKenna,* 74 F. (2d) 155.

Finally, the Court of Appeals says the Judge did not understand that credibility was being attacked, although the Judge specifically stated, in excluding the question, the subject matter (prior convictions) to which he would limit an attack upon credibility.

3

The Court below thought this Court's decision in *United States* v. *Johnson,* 327 U. S. 106 applicable to preclude review of the Judge's findings upon the motion for a new trial for newly discovered evidence. But that decision did not purport to preclude review where the Judge's findings are supported by no evidence. Here the prosecutor himself testified that the witness Grossman, expecting a sen-

tence of ten years if convicted after trial, had been "holding out for a deal" before pleading guilty, and that he (the prosecutor) had indicated to the witness's lawyer his view that the witness's sentence would not exceed three years if he pleaded guilty. The contrary trial testimony of Grossman was therefore necessarily false, and the Judge's finding that it was "truthful and accurate" was supported by no evidence taken on the hearing of the motion for a new trial. There was no "conflicting evidence" upon which to rest this finding.

The Judge's additional speculative finding that such false testimony, if disclosed, would not have affected the witness's credibility with the jury, was not precluded from review, but on the contrary should have been reviewed, as was indicated by this Court in *Griffin* v. *United States,* 17 Law Week 4370 (decided April 29, 1945). The Court below has misinterpreted the decision in *United States* v. *Johnson supra,* to preclude review of a denial of a motion for a new trial, even where the Judge's findings contradict the evidence taken, and purport to relieve the jury, on the basis of mere speculation, of its function of evaluating evidence.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this Court to the United States Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein; and that the judgment of the said United States Court of Appeals insofar as it affirmed the District Court's judgment in this case may be reversed, and that petitioner may have such other relief as this Court may deem appropriate.

Dated: New York, New York, May 11, 1949.

ANTHONY VESPOLE,
Petitioner,

By J. BERTRAM WEGMAN,
Counsel for Petitioner.